COLUMBIA LAW REVIEW.

Published monthly during the Academic Year by Columbia Law Students.

SUBSCRIPTION PRICE, $2.50 PER ANNUM. 35 CENTS PER NUMBER.

NOTES.

THE CONSTITUTIONALITY OF THE FEDERAL EMPLOYERS' LIABILITY ACT.—The question as to the constitutionality of the act approved by Congress June 11, 1906, entitled "An act relating to liability of common carriers * * * engaged in commerce between the States * * * to their employés," has been raised and passed upon in two recent Circuit Court cases. *Brooks* v. *The Southern Pacific Co.* (U. S. C. C. West. Dist. Ky. Dec. 31, 1906), *Howard* v. *The Ill. Cent. RR. Co. et al* (U. S. C. C. West. Dist. Tenn. West. Div. Jan. 1, 1907). In both cases the act was declared unconstitutional and upon precisely the same grounds; namely, first, that the subject matter of the act is not a regulation of commerce among the States within the meaning of Art. I, sec. 8, cl. 3 of the federal constitution, and, second, that even if the act is a regulation of such commerce, it is unconstitutional in that it regulates intrastate commerce as well as interstate commerce, the two being so inseparably combined as to vitiate the whole act. Either one of these grounds is of course sufficient to invalidate the act. The decision of unconstitutionality on the first ground, however, raising as it does a much larger and more difficult constitutional question, and involving the fundamental power which is the source from which the authority to pass such an act must flow, is much broader and more comprehensive in its results than the decision upon the second ground. If the act is unconstitutional upon the second ground alone, it can be remodeled with small difficulty so as to exclude regulation of intrastate commerce

whereas if unconstitutional upon the first ground, that Congress has no power under the commerce clause of the constitution to exercise direct control over the liabilities of employer to employé, then, without a constitutional amendment, any Employers' Liability Act whatsoever, as such, must be beyond the scope of Congressional authority. It seems probable, because of the desire of such an act on the part of the federal government, that every effort will be made to overthrow the decisions of the lower courts on the first ground, and establish the power of Congress to regulate the liabilities of carriers engaged in interstate commerce to their employés.

An examination of the cases, however, and the principles governing the power of Congress to legislate concerning interstate commerce does not seem to indicate that such a result can be effectuated. Since the federal government is one of enumerated powers, Cooley, Const. Lim. 11; *Martin* v. *Hunter's Lessee* (1816) 1 Wheat. 304, 326, it is obvious that if the authority by which Congress may pass an Employers' Liability Act is not granted by Art. I, sec. 8, cl. 3, giving Congress power "to regulate commerce with foreign nations and among the several States, and with the Indian tribes," it does not exist. The prime purpose in granting this power to regulate interstate commerce to Congress was to secure a uniform system of commercial regulation among the States, *Gibbons* v. *Ogden* (1824) 9 Wheat. 1, 190, 223, 224–225, and to secure commerce among the States against the discriminating state legislation which was bound to result from local jealousies and partial interests. *Veazie et al.* v. *Moor* (1852) 14 How. 568, 574; *Railroad Co.* v. *Richmond* (1873) 19 Wall. 584, 589; *Welton* v. *Missouri* (1875) 91 U. S. 275, 280; *Brown* v. *State of Maryland* (1827) 12 Wheat. 419. In order that Congress should not be hampered in the accomplishment of this end, and that the grant might be coextensive with the evil to be remedied, *Brown* v. *State of Maryland*, supra 446, the courts have been very liberal in defining the scope of this power, describing it as the power to prescribe rules for carrying on and conducting commercial intercourse in all its branches, being without limitations excepting those prescribed by the constitution, and including navigation, transportation both of persons and property and the various instrumentalities of commercial intercourse and exchange. *Gibbons* v. *Ogden*, supra 189–190, 196, 229; *Welton* v. *Missouri*, supra 279–280; *County of Mobile* v. *Kimball* (1880) 102 U. S. 691, 696–697; *Gloucester Ferry Co.* v. *Pennsylvania* (1884) 114 U. S. 196, 203. They have further declared it to be in accordance with the purpose of the grant that it should be absolutely exclusive to the federal government whenever the subjects of regulation are in their nature national and admit of only one uniform system of regulation, leaving to the States to regulate, as an incident to the exercise of their sovereign power, whatever remains, until Congress sees fit to exercise its powers to regulate such remaining subjects. *Cooley* v. *Board of Wardens etc.* (1851) 12 How. 299, 319; *Gloucester Ferry Co.* v. *Pennsylvania*, supra 204; and see 4 COLUMBIA LAW REVIEW 490; 5 *id.* 301. On the other hand, the courts do not concede to Congress the power to regulate every subject which may indirectly or remotely affect the operations of interstate commerce. Such an unlimited power is not reasonably within the

purpose of the grant to Congress, and to include it within the grant would bring within the realm of federal control a large sphere of mercantile activity which is primarily and naturally domestic. *Hooper* v. *California* (1894) 155 U. S. 648, 655. Accordingly it is held that business enterprises, *Hopkins* v. *United States* (1898) 171 U. S. 578, taxes, *Ficklen* v. *Shelby Co.* (1891) 145 U. S. 1, regulation of tort liabilities, *Sherlock* v. *Alling* (1876) 93 U. S. 99, 104, and agreements, *Williams* v. *Fears* (1900) 179 U. S. 270, 278; *United States* v. *Knight* (1894) 156 U. S. 1, 16; *Anderson* v. *United States* (1898) 171 U. S. 604, which are only remotely and incidentally connected with interstate commerce do not thereby become subject to federal control. Thus it would seem that the general rule to be deduced from the cases is that whenever legislation enacted in pursuance of the power granted to Congress to regulate interstate commerce is primarily directed towards the accomplishment of the end and purpose of that power, namely, to secure uniformity of regulation and avoid discriminating state legislation, such federal legislation should be upheld; and not otherwise. Adopting this rule, it would seem that since the Employers' Liability Act under discussion is directed, not primarily towards the regulation of commerce among the States, but towards the regulation of the liability between employer and employé engaged in interstate commerce, its constitutionality is extremely doubtful. The regulation of the liabilities of a carrier is not a regulation of interstate commerce simply because the carrier is engaged in interstate commerce. *Sherlock* v. *Alling*, supra. As is pointed out in the principal case of *Howard* v. *The Ill. Cent. RR. Co.*, supra, there is a clear distinction between declaring the liability for an infraction of rules for the regulation of commerce as is done in the Safety Appliance Act, March 2, 1893, c. 196, 27 U. S. Stat. 531, and the regulation of that liability itself. Hence, it would seem that if Congress is to have the power to enact an Employers' Liability Act, without a constitutional amendment, it must be done merely as an incidental definition of the liability of carriers to their employés for the infraction of authorized regulations of interstate commerce. Certainly, it is difficult to see how the act in its present form can be upheld without overturning former principles laid down by the courts and opening the way to unlimited control by Congress of all subjects remotely or incidentally connected with interstate commerce.

The second ground of the decisions in the principal cases, involving merely a question of interpretation, is clearly correct. The act reading "That *every* common carrier engaged in trade or commerce * * * shall be liable to *any* of its employés" manifestly includes employés whose services may be wholly confined to intrastate commerce, and the courts are not inclined to remedy such defects in accordance with the presumed intention of Congress by judicial interpretation. See *Ill. Cent. RR. Co.* v. *McKendree* (1906) — U. S. —. It seems clear that whatever attitude the Supreme Court may take in regard to the general right of regulating the liability of employers, the Circuit Court decisions must be sustained upon the second ground.

THEORIES OF ADMISSIONS IN EVIDENCE.—Judicial opinion has come to a fairly definite understanding as to when previous extra-judicial